No. 7776.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CARL F. NOBLE,

Appellee.

On Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLEE

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INDEX

	Page
Appellant's Statement of the Case Controverted	3
Questions Presented	6
Argument	6
Abandonment of Assignments of Error	6
Opinion Evidence	7
Hypothetical Question Not Objectionable on any Grounds Stated in Objection	10
Ruling in the Case of United States vs. White 77 Fed. (2nd) 757	10
This is an Action at Law	12
Evidence Amply Sustains the Verdict	14
Work Record Inconsequential	20
Conclusion	27

CITATIONS

Cases	Page
2 Bancroft Code Practice & Remedies 1840, Section 1368	8
Belk vs. Meagher 104 U. S. 279 26 L. Ed. 735	13
Burley vs. German American Bank 111 U. S. 216 4 Sup. Ct. Rep. 341 28 L. Ed. 406	13
Cavanzos vs. Trevino 6 Wall 773 18 L. Ed. 813	13
City of Goldfield, Colo. vs. Roger 249 Fed. 39	6
Clooney vs. Wells (Mo.) 252 S. W. 72	8-9
Crouch vs. National Livestock etc. (Ia.) 217 N. W. 557	8
Crouch vs. U. S. 266 U. S. 180 69 L. Ed. 233 45 Sup. Ct. Rep. 71	12
Downey vs. Hicks 14 How. 240 14 L. Ed. 404	13
Erickson vs. Webber (S. Dak.) 234 N. W. 558 at 559 at 561-562	8
Ferrari vs. Beaver Hill Coal Co. 54 Ore. 210 102 Pac. 1016	8

Cases Page

Hanna vs. Maas 122 U. S. 24 7 S. Ct. 1055 30 L. Ed. 1117 13

Herencia vs. Guzman 219 U. S. 44 31 Sup. Ct. Rep. 135 55 L. Ed. 81 13-14

Holmes vs. Goldsmith & Co. 147 U. S. 150 13 S. Ct. Rep. 288 37 L. Ed. 118 13

Hoyt vs. U. S. 10 How. 109 13 L. Ed. 348 13

Hoyt vs. Hamburg 128 U. S. 584 9 S. Ct. 176 32 L. Ed. 565 13

In re: Huston 163 Cal. 166 124 Pac. 852 8

Law vs. U. S. 266 U. S. 494 45 S. Ct. 175 69 L. Ed. 401 reversing (CCA 1924) 299 Fed. 61 which reversed (DC 1923) 290 Fed. 972 12

Lohman vs. Stockyard Loan Co. 243 Fed. 517..... 6

Lumbra vs. U. S. 290 U. S. 551 78 L. Ed. 492.... 26

Mechanics Bank of Alexandria vs. Seaton 1 Pet. 299 7 L. Ed. 152 13

Moline Trust & Savings Bank vs. Wylie 149 Fed. 734 6

New Orleans O. & G. W. R. Co. vs. Lindsay 4 Wall 650 71 U. S. 243 18 L. Ed. 328 13

Phoenix R. Co. vs. Landus 13 Ariz. 80 108 Pac. 247 8

Pomeroy vs. State Bank of Ind. 1 Wall 592 17 L. Ed. 638 13

Renner vs. Columbia Bank 9 Wheat 581 6 L. Ed. 166 13

Schuchardt vs. Allen 1 Wall 359 17 L. Ed. 642..... 13

Sigafus vs. Porter 841 Fed. 430 14

Southern Ry. vs. Guilat (Ala.) 48 S. W. 472..... 8

Springfield F. & M. Ins. Co. vs. Sea 21 Wall (U. S.) 158 22 L. Ed. 511 13

Stebbins vs. Duncan 108 U. S. 32 2 Sup. Ct. Rep. 313 27 L. Ed. 641 13

Sterlen vs. Bush (Ia.) 195 N. W. 369 at 372..... 8

Cases Page

Stoddard vs. Chambers 2 How. 284 11 L. Ed. 269.. 13

Texas N. O. R. Ry. vs. Gross (Tex.) 128 S. W. 1173 8

Todd vs. Chi. City Ry. Co. 197 Ill. App. 544..... 8

Turner vs Yates 16 How. (U. S. 14 14 L. Ed. 824.. 13

United States vs. Fitch 256 U. S. 547 65 L. Ed. 1084 41 Sup. Ct. Rep. 568 12

United States vs. McGovern 299 Fed. 302 affirming 294 Fed. 108 writ of error dismissed 45 S. Ct. 351 267 U. S. 608 69 L. Ed. 812..... 12

United States vs. Moreno 1 Wall 400 17 L. Ed. 633 13

United States Potash Co. vs. McNutt (CCA 10) 70 Fed. (2nd) 131 7

United States vs. White 77 Fed. (2nd) 757..... 10

Van Gunden vs. Iron Co. 52 Fed. 838..... 7

Wabash Screen Door Co. vs. Black 126 Fed. 721....14

Williams vs. Kirtland 13 Wall 306 20 L. Ed. 683.... 13

RULES

Page

Rule of Circuit Court of Appeals Ninth Circuit, Rule 24 6

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APPELLANT'S STATEMENT OF CASE CONTROVERTED.

The statement of the case of the Appellant is so unfair, misleading and incomplete that it leads one to believe that the writer of the brief has failed to read the record.

The statement of facts contained in the Appellant's brief would lead one to believe that the Appellee had become slightly nauseated, made sick for only four or five days, and returned to the arduous labor of farmer which he continued to perform until the time of the trial, making large sums of money and raising much wheat; that his farming operations were conducted by hired help through his personal supervision.

It will be noted, however, that counsel fail to refer to the Record to substantiate these statements. The fact is the Record discloses that before the plaintiff

went over-seas, and when first in the army, and while still strong and healthy he was attacked by a period of sickness which caused severe vomiting, diarrhea, and dizziness; that he reported to the infirmary but was compelled to do duty during this period of sickness and his sickness was so obvious that his First Sergeant came around and ordered him taken back to the infirmary and detailed a Corporal to take him there. (R. 44 and 45.) After four or five days of this attack he recovered and then later at Camp Greene had the mumps and had them so severely that they "went down on him" and he had them for four or five days and reported to the infirmary repeatedly but could get no relief until after they had "gone down on him", and this significant fact is overlooked entirely that while this man had the mumps, and while they were "down on him" they compelled him to duty in this weakened condition, compelled him to march and carry a pack weighing some seventy-three pounds on a long two mile march, and this experience knocked him out completely, and he had to go to bed and that he did no duty from then on until he went to France. (R. 35 to 40.) That during this period while he was sick he had to do duty up until the time he left for Camp Merritt and was in bed for two days on the train on the way to Camp Merritt. (R. 39.) On arrival at Camp Merritt he again went to bed and was marked "quarters" by the Doctor upon his arrival. He remained for two more days in bed and was up in quarters doing no duty while they were in quarantine and until they went to France. (R. 39-40.) That he went overseas and was severely gassed and more than that he

was so much over-worked and had gone so long without sleep that there was detailed a special gas guard to prevent him from being killed by gas. (R. 42.) That despite all of this sickness and treatment the man carried on, was severely sick and constantly vomiting for a period of ten days from this first gassing. (R. 42.) Thereafter and while in Luxemburg he had a severe case of influenza. (R. 43.) While in France and as a Wagoner up at the front, working night and day under shell fire he was so persistently devoted to duty that he carried on despite the fact that he was obviously physically unfit for service. While up at the St. Mihiel Front, and on a wagon supplying ammunition to the front, a shell hit under the wagon, blowing it all to pieces and the team dragging him to the bottom of a mountain. (R. 69 and 70, and R. 84.)

It is obvious from the testimony of two men who served with him in the service that the man was completely shell shocked and out of his head a greater portion of the time he was serving at the front. (Testimony of Bullock R. 66 to 105, and Testimony of Hillstrand R. 105 to 117.)

The Record is replete with indications that this man was carring on with his duty long after he ought to have reported back to the hospital and was doing it at a great expense to his health, and counsel for the Appellant make much of the fact that he regularly performed duty despite his sickness. But in the days when the life of an individual seemed pretty cheap to offer as the price of winning battles, they looked upon such sacrifice with a different attitude

as is indicated by the fact that the Appellant, through its proper officers, showed its appreciation of such conduct on the part of the Appellee by decorating him for bravery and citing him for devotion to duty during the St. Mihiel and Argonne offensives. (R. 63.)

QUESTIONS PRESENTED.

As is indicated by the brief of the Appellant, there are but two questions presented by the Assignments of Error, and particularly by the Specifications of Error in the brief. One, that dealing with a hypothetical question propounded to one of the Doctors, and the other question having to do with the sufficiency of the evidence to justify the verdict. Specification VII raises the first question. Specifications XI, XII, XIV, XVII and XXX raise the second question.

ARGUMENT

ABANDONMENT OF ASSIGNMENTS OF ERROR.

Having failed to specify in their brief other Assignments of Error than those noted above, Appellant has abandoned all other assignments. *Rule of the Circuit Court of Appeals Ninth Circuit, Rule 24.*

This rule has been adopted by every Circuit Court of Appeals in the United States and by the United States Supreme Court and has been interpreted on numerous occasions so as to hold this to constitute an abandonment of all assignments not properly set forth as specifications of error in the brief. *Lohman vs. Stockyard Loan Co. 243 Fed. 517; City of Goldfield, Colo. vs.*

Roger 249 Fed. 39; Moline Trust and Savings Bank vs. Wylie, 149 Fed. 734; Van Gunden vs. Iron Co. 52 Fed. 838; U. S. Potash Co. vs. McNutt (CCA 10) 70 Fed. (2nd) 131.

OPINION EVIDENCE

The only error assigned with reference to hypothetical questions or opinion evidence of the Doctors is that specified on page four of Appellant's brief and is Assignment of Error Number VII. It will be noted that the only objection made to the question was that it was irrelevant, incompetent and immaterial, and that it did not state a definition of total permanent disability to the liking of counsel for the Appellant, and that the objection wholly fails to direct the court's attention to any impropriety in the question arising out of the fact that it might be an invasion of the province of the jury. On the contrary the objection, if the trial attorney had in mind that it was erroneous because it was an invasion of the province of the jury, was so designed as to lead the Court into error because the only specific objection to the question was that a definition which he sets forth in his objection of total permanent disability was not given in the question. Further objection was made to the question on the grounds that it did not include more of the evidence. Nowhere is the objection made that the question was an invasion of the province of the jury or that the Doctor was called upon to render an opinion upon a question which the jury would have to decide, and on the contrary, the whole objection would indicate to the Court that that feature, if any existed

in the question, was not objectionable.

Where a general objection is interposed to a question that it is irrelevant, incompetent and immaterial and certain specific objections are also made, it has been uniformly held that the general objection is too general to raise a specific objection and that only such specific objections as are made at the trial below will be considered on appeal. Thus the objection here made is too general to raise the point that the question was objectionable on the grounds that it invaded the province of the jury, nor was this specific objection made. It is likewise uniformly held that where specific objections are made all other specific objections not made are waived. *2 Bancroft Code Practice and Remedies 1840, Section 1368 Crouch vs. National Livestock etc. (Ia.) 217 N. W. 557. Erickson vs. Webber (S. Dak.) 324 N. W. 558 at 559 at 561-562. Clooney vs. Wells (Mo.) 252 S. W. 72. Todd vs. Chicago City Railroad Co. 197 Ill. App. 544. Sterlen vs. Bush (Ia.) 195 N. W. 369 at 372 Texas N. O. R. Ry. vs. Gross (Tex.) 128 S. W. 1173. Southern Ry. vs. Guilat (Ala.) 48 S. W. 472. In re: Huston 163 Cal. 166 124 Pac. 852. Ferrari vs. Beaver Hill Coal Co. 54 Ore. 210 102 Pac. 1016 Phoenix R. Co. vs. Landus 13 Ariz. 80 108 Pac. 247.*

The case of *Crouch vs. National Livestock, etc. supra, (Ia.) 217 N. W. 557,* is directly in point. The following question was propounded to the witness in the court below:

> "What in your opinion would you say caused the death and the injury to the animals described".

The objection of the Appellant was that the ques-

tion was hypothetical, irrelevant, incompetent and immaterial and based upon facts not in the record or at least not founded on a sufficient state of facts in the record. The Court at page 561 after emphatically pointing out that the question was a clear invasion of the province of the jury and was in that respect improper in that it left nothing for the determination of the jury, said:

> "Such a question has been repeatedly condemned by this Court * * * * * but it is contended, however, that the objection to the testimony was insufficient to raise the question now urged. We have recognized as a general rule that the objection that evidence is irrelevant, incompetent and immaterial is not sufficient to raise a specific objection on appeal. We are disposed to hold that the objection as made was too general to raise the question now urged by Appellant."

Another case directly in point is that of *Clooney vs. Wells supra (Mo.) 252 S. W. 72* wherein the Court, discussing an exactly similar situation, said:

> "But aside from all this the only objection to the testimony below was 'I will object to this as calling for a conclusion'. The objection now urged is that it invaded the province of the jury. No such objection was made on the trial. Parties cannot shift their position. As no objection was made on the trial it was waived and cannot be urged now." *(Citing Gaty vs. United Rys. Co. 227 S. W. 1041)* "wherein the court said on page 1046 'additional objections are now urged but as they were not made at the time the evidence was received they were waived and cannot be considered'."

HYPOTHETICAL QUESTION NOT OBJECTIONABLE ON ANY GROUNDS STATED IN OBJECTION.

A mere casual review of the record herein and of the hypothetical question propounded shows that the question propounded was not in any way objectionable on any of the grounds stated in the objection of counsel. Indeed, that is so true that counsel for Appellant in their brief do not even intimate that it was objectionable upon any of the grounds stated in the objection, but insist that it was objectionable because it invaded the province of the jury and intimate that special rules of evidence are applicable to war risk insurance cases in the following language:

> "It has become well established that an expert should not be permitted to express an opinion upon the exact point for jury determination and with specific reference to war risk insurance suits 'the experts ought not to have been asked or allowed to state their conclusions on the whole case.'" (Appellant's brief pp. 9 and 10.)

RULING IN THE CASE OF *United States vs. White 77 Fed. (2nd) 757.*

It is true that this court in an opinion rendered May 20th, 1935 in the case of *United States vs. White 77 Fed. (2nd) 757* reversed and remanded for a new trial a cause because there was propounded to two doctors a hypothetical question calling for their opinion as to whether the insured was totally and permanently disabled at the time of his discharge even though no objection was made to the question in the lower court and no assignment of error was predicated

thereon and this court assigned as authority for their holding in that respect Rule 11 of this court.

We respectfully submit that there is nothing in Rule 11 to do more than to authorize this court to ignore the failure of Appellant to make an assignment of error and that there is nothing whatever in said rule authorizing this court to take cognizance of an objection raised for the first time on appeal or to obviate the necessity of an Appellant making a proper objection in the lower court procuring the ruling thereon and noting an exception thereto.

If no objection was made in the lower court, we respectfully submit that the lower court could not be in error because the lower court made no ruling that could be considered erroneous. Before an error can be plain or exist at all there must have been some act to constitute the error. To say that a trial court must watch the record in the trial of a law suit and permit no improper evidence to go in regardless of whether objections are made or not, is to say that it is the duty of the lower court to try the cause as counsel for both sides.

To follow the White decision is to do away entirely with the necessity of making objections or noting exceptions or assignments of error or specifications of error. Surely this cannot be the intention of this court. It occurs to counsel for the Appellee that there must have been something in the record of the case of United States vs. White which necessitated sending that cause back for a new trial and that it was the intention of this court to point out to the lower court for the purpose of a new trial error committed in

order that it might not be committed upon the retrial. However, if the intention of this court was as it appears from the face of the opinion in the case of United States vs. White, supra, then it is contrary to all of the decisions available to counsel for Appellee.

THIS IS AN ACTION AT LAW

Contrary to the inference contained in the quotation from the brief of the counsel for the appellant that special rules should apply to war risk insurance cases, it has been decided by the Supreme Court of the United States on several occasions that an action on a War Risk Insurance policy is a plain and simple action at law and the same has likewise been decided by this court. *United States vs. Fitch 256 U. S. 547 65 L. Ed. 1084 41 Sup. Ct. Rep. 568. United States vs. McGovern 299 Fed. 302 affirming 294 Fed. 108, writ of error dismissed, 45 S. Ct. 351 267 U. S. 608 69 L. Ed. 812. Law vs. United States 266 U. S. 494 45 S. Ct. 175 69 L. Ed. 401 reversing (C.C.A. 1924) 299 Fed. 61 which reversed (D.C. 1923) 290 Fed. 972. Crouch vs. United States 266 U. S. 180 69 L. Ed. 233 45 Sup. Ct. Rep. 71.*

As Mr. Justice Brandeis said in the case of *Law vs. United States, supra, 266 U. S. 494 45 S. Ct. 175 69 L. Ed. 401:*

> "This is an action at law, brought in the Federal court for Montana, on a contract for insurance issued under the War Risk Insurance Act * * * * *.
>
> "The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the court in actions at law for money compensation."

Under "the usual procedure of the court in actions at law for money compensation" an Appellate court never takes cognizance of an objection raised for the first time on an appeal and will not hold the lower court in error when that tribunal was not called upon to make a ruling by which it could get into error. *Hanna vs. Maas 122 U. S. 24 7 S. Ct. 1055 30 L. Ed. 1117. Turner vs. Yates 16 How. (U. S.) 14 14 L. Ed. 824. Springfield F. & M. Ins. Co. vs. Sea 21 Wall (U. S.) 158 22 L. Ed. 511. New Orleans, O. & G. W. R. Co. vs. Lindsay 4 Wall 650 71 U. S. 243 18 L. Ed. 328. Mechanics Bank of Alexandria vs. Seaton 1 Pet. 299 7 L. Ed. 152. Hoyt vs. U. S. 10 How. 109 13 L. Ed. 348. Downey vs. Hicks 14 How. 240 14 L. Ed. 404. U. S. vs. Moreno 1 Wall 400 17 L. Ed. 633. Pomeroy vs. State Bank of Indiana 1 Wall 592 17 L. Ed. 638. Schuchardt vs. Allen 1 Wall 359 17 L. Ed. 642. Cavanzos vs. Trevino 6 Wall 773 18 L. Ed. 813. Williams vs. Kirtland 13 Wall 306 20 L. Ed. 683. Stebbins vs. Duncan 108 U. S. 32 2 Sup. Ct. Rep. 313 27 L. Ed. 641. Burley vs. German American Bank 111 U. S. 216 4 Sup. Ct. Rep. 341 28 L. Ed. 406. Belk vs. Meagher 104 U. S. 279 26 L. Ed. 735. Holmes vs. Goldsmith & Co. 147 U. S. 150 13 S. Ct. Rep. 288 37 L. Ed. 118. Hercncia vs. Guzman 219 U. S. 44 31 Sup. Ct. Rep. 135 55 L. Ed. 81. Hoyt. vs. Hamburg 128 U. S. 584 9 S. Ct. 176 32 L. Ed. 565. Stoddard vs. Chambers 2 How. 284 11 L. Ed. 269. Renner vs. Columbia Bank 9 Wheat 581 6 L. Ed. 166.*

In all of the above cited cases the Supreme Court

since the very earliest times and on down to the present day has followed the old well established rule that nothing which occurs in the progress of the trial below can be assigned as error in the Appellate court which was not called to the attention of the court below and decided by it and when specific objections are made to the admission of evidence the court has a right to assume that all others are waived and proceed with the case accordingly.

There are literally thousands of federal and state court cases announcing the same rule. Corpus Juris states the rule as follows:

> "Objections to the admission of evidence cannot be raised for the first time on appeal and the rule is applicable whatever may be the grounds which render the evidence inadmissible." *3 C. J. 806.*

and to this rule they actually cite thousands of cases.

The rule applies as well to the reception of opinion evidence and the allowance of hypothetical questions. *Herencia vs. Guzman 219 U. S. 44 31 Sup. Ct. 135 55 L. Ed. 81. Wabash Screen Door Co. vs. Black 126 Fed. 721. Sigafus vs. Porter 841 Fed. 430.*

EVIDENCE AMPLY SUSTAINS THE VERDICT.

All of the assignments of error other than the assignment heretofore discussed and predicated upon opinion evidence are based upon the assertion that the evidence does not justify the verdict.

Appellee enlisted September 20th, 1917 and was discharged July 30th, 1919. (R. p. 61-62). Shortly after enlisting and while on his way from Camp Gettysburg to Camp Green he became sick, was nauseated, vomited and had diarrhea and was dizzy.

Upon arrival the first night he vomited all night and had to go to the latrine several times and went on sick report the next morning but was marked "duty" and went out and attempted to do "duty" but had to drop out of formation and sit down. His drill sergeant ordered him back in line and the first sergeant overruled him and appointed a corporal and a private to take him over to the infirmary and he was taken to the infirmary but again marked "duty". He went out the next morning and kept on trying to do "duty" as a soldier and after a few days he became better. He made two or three more trips to the infirmary. He was sick for three or four days. (R. p. 34-35.) Thereafter and while at Camp Green he got the mumps and reported to the infirmary. The doctor said there was nothing wrong with him and sent him back to "duty" in the morning but he returned again to the infirmary in the afternoon and was again examined and again marked "duty", and given castor oil. He went back to "duty" but was feeling so sick he was unable to do "duty". (R. p. 36.-37.) The next morning the mumps had gone down on him and he reported back to the infirmary and the doctor admitted that he had had mumps but stated that he was over them and marked him "duty". His condition at that time is described by a buddy who was with him and who did a portion of his work while he had the mumps (R. p. 66) as follows:

> "I observed with reference to his mumps after that that he was swollen at the neck, and he was swollen at the groin, below. We were in the same Camp together. As to what I observed with refer-

ence to his testicles, they were swollen up. As to what occurred with reference to any treatment of the mumps, he went over to the infirmary on a sick call, and they marked him 'duty'." (R. p. 67.)

And again:

"I stated that Carl walked straddle legged and that he had a swelling in his neck, and he had a swelling in his groin and that his testicles were swollen. * * * * * I did see a medical officer in that infirmary make an examination of his groin or testicles; that was at the time I reported at the infirmary with him, some time in April * * * * * A medical officer asked him if he had been injured. * * * * * The medical major said that he had had the mumps but that he was then over them." (R. pp. 82 and 83.)

While in this condition he was compelled to do duty and was compelled to carry his entire equipment about two miles on a march when they entrained for Camp Merritt. (R. p. 38.) His pack and equipment weighed 73 pounds. (R. p. 39.) Thereafter he was sick on the train for two days and laid on his bunk all the time. (R. p. 39.) Immediately upon arrival at Camp Merritt he went to the barracks and went to bed and on an inspection the next morning by a doctor he was marked "quarters" and remained in bed for another two days and remained in "quarters" until he went to Hoboken to go overseas. (R. p. 40.) Thereafter and while at St. Mihiel sector on the 14th of September, he was gassed. He had been out over 48 hours and was very near to exhaustion, so much so that they detailed a special guard to watch him to see that he had his respirator on properly and the next day after being gassed he began vomiting, was sick and had diarrhea and remained sick and had a sore chest for more than a week or ten days.

(R. p. 42.) Later and again while up in the Argonne he was gassed several times in the middle of October and continued vomiting frequently for several days thereafter and had the diarrhea continuously from then on until after the Armistice. (R. pp. 42-43.) While in the Argonne and while driving a supply wagon a shell hit under the wagon cutting the brake rod and dug a big hole in the road, tore parts of the wagon off, the shell going through the side part and the end-gate in the wagon and blew off part of the end-gate and the team went to the bottom of the mountain and the Appellee was mixed up with the rations at the bottom of the mountain. (R. p. 70.) The witness who saw the transaction stated that he did not see the Appellee for four or five days thereafter and described his condition five days thereafter as follows:

> "I said I didn't see him again for about five days. As to his condition when I saw him after that. He was up. If you would ask him anything he would flutter, his hands would go, he would stutter, and at numerous times I would ask him for rations, when we were dishing out rations his hand would shake like that (Indicating), and he would stutter, hands shake, and looked like a man that was about twenty years older. Prior to this occurrence Carl did not stutter that I know of." (R. p. 70.)

After the Armistice and while up in Luxemburg the Appellee had an attack of influenza and was laid up for four or five days with the flu. (R. pp. 43-44.) Another buddy who served with him overseas and time he was under actual shell fire when they were who saw him frequently described the periods of

up for the first time at Chateau Thierry for 39 days, Sandy A sector for 39 days and St. Mihiel sector for 10 days. This witness described the condition of the Appellee while up at the front as that of an evident shell shock and said:

"As I remember Noble he was always riding a mule, and he was a man of a highly nervous disposition, that is, he was in the Argonne." (R. p. 109.)

"I will describe how he appeared up there and how he acted. He acted like if it was too much of a nervous strain for him. He was shell shocked in our opinion. (R. p. 110.)

"When I saw him he was sitting on that mule. He was always yelling at the men, and spitting all over himself. He would get so excited he was wild. He would curse anybody that would interfere with his work, I presume. I have seen him curse officers, which he could get court martialed for. He was a likable fellow. He would have cursed General Pershing. His main purpose was to get those wagons up there whether it killed him." (R. p. 111.)

"He was practically gray haired then. As to whether it was that way when I first saw him in November, I will say it was a dark brown." (R. p. 111.)

When coming home on the boat immediately prior to his discharge this witness described his condition as follows:

"It was generally the same as he was in the war in the Argonne. He was nervous and awfully temperamental, and he stuttered a lot. He was nerve racked; he did not have any nerves. He looked a lot older. In fact we considered him the old man when we came home." * * * * * "That was the condition he was in when he was discharged." R. pp. 115-116.)

In addition to this the Appellee described his condition just before discharge as follows:

> "I was rather nervous, soft, couldn't stand much exertion. In fact I hadn't been doing a great deal of exertion. I was short of breath and the veins in my neck would throb and my ears would throb and I would have palpitation." (R. p. 45.)

Immediately upon coming home he attempted to do some work plowing, concerning which he testified:

> "I was plowing and would find myself rigid and stiff on the plow. I would relax and before I would go thirty rods I would be the same condition, just as tight as a fiddle string." (R. p. 47.)

Speaking of his work he said:

> "It would be interrupted by sleepless nights. My heart would get to palpitating and the bed would shake, and when I wouldn't work I wasn't troubled much. * * * * * I would be restless and my heart would pound and I could feel the bed shake. After I had gone to sleep I would have these nightmares, troubled dreams. Most of them were connected up with hearing men hollering. These fellows had liquid fire on them and were hollering. I would want the fire put out. I imagined I had it on myself sometime." (R. p. 49.)

This is the condition the man was in when discharged from the army and prior to his discharge. Surely a condition of total disability which his subsequent history shows remained with him permanently. The testimony of each and every witness both medical and lay shows that this condition existed at all subsequent times. Palpitations of the heart so positively described is shown by the testimony of Dr. Allred to be an indication that he had myocarditis at that time. (R. p. 202.)

The testimony of Dr. E. S. Porter as to his ex-

amination made of him as early as February 1923 indicates that his heart trouble existed then and that its principal manifestation was the palpitations and shortness of breath that the man described as having before his discharge from the army. Dr. Porter said:

> "The heart was unable to respond to ordinary exertion in the normal manner. That is, ordinary exertion would bring on this pain and shortness of breath and palpitation, weakness. I think I diagnosed his case at that time as valvular heart disease." (R. p. 25.)

The manner in which these disabilities have affected the Appellee, preventing him from doing any work since his discharge from the army are graphically set forth in the testimony.

WORK RECORD INCONSEQUENTIAL.

Much is made by counsel for Appellant of what they term "the work record of Appellee" after his return from the army. Naturally one who so persistently "stuck to his guns" under adverse conditions despite sickness and physical handicaps as to attract the attention of his superior officers to the extent that they cited him for devotion to duty (R. p. 63) cannot be expected to come home and lay down without making an effort to get by despite the physical handicaps that he brought home with him. This man came home and attempted to carry on but very soon found that he could not do so. To fairly appraise the situation one must take into consideration the situation under which the Appellee's testimony was given. His testimony was taken by way of deposition some sixteen months before the trial (R.

p. 30) and he remained in such precarious condition that at the time of trial he was unable to be there, (R. p. 29) so that it was impossible for him to take the stand to refute certain inferences sought to be drawn from evidence introduced. This man owned a large farm before he went into the army which his brother was farming during his absence. (R. p. 48.) Counsel for Appellant states that upon his return from the army in the year 1919 he began doing work plowing and seeding. Obviously this is incorrect. He didn't get out of the army until July 30th, 1919 (R. p. 62.) At that time the spring plowing and seeding would have all been done. Nothing remained to be done except harvesting the crop that had previously been put in by his brother. It is true that the testimony of the Appellee (R. pp. 47-48) might give one a wrong impression unless carefully read but at the bottom of the page it is shown conclusively that he was speaking of the spring of 1920 rather than 1919 and that upon his arrival home from the army the harvesting was practically all done, (R. p. 49) and it was in that fall that he attempted to do some plowing but his heart woud get to palpitating and he had sleepless nights. When he didn't work he wasn't troubled and when he did work he would be restless. His heart would pound and he could feel the bed shake. He had nightmares and troubled dreams most of which were connected up with hearing men hollering because they had liquid fire on them. He would be trying to put out the fire and imagined that he had the fire on himself. (R. p. 49.) The next spring his brother again put in the crop but the Appellee himself was

unable to be of any help as the same condition prevailed that had prevailed previously. (R. p. 40.) The fact is that most of the work was done prior to the time Carl got back from the army. That is, all of the summer fallowing was done prior to his return from the army. Nothing was left to be done except the seeding. (R. p. 175.) His brother testified:

> "As to whether I had any help to put that crop in that spring, I put that crop in practically all myself. Carl did not do anything towards putting in the crop other than what I have already testified to." (R. p. 176.)

The testimony to which he referred was to the effect that Carl attempted to drive the team some in harrowing but that he could stand it only for a while and then would have to quit and would lay off. That he might work a day at a time some of the time and maybe couldn't work a full day. If he worked longer than a day he would be completely worn out. (R. p. 175.) Then as to the summer fallowing that was done in 1920, the brother did all of the summer fallowing. Carl did none of the work of summer fallowing that fall. (R. p. 177.) In the spring of 1921 there was some spring wheat to be planted. It took about two days to plant it. Carl started it and worked about a half day and had to quit and his brother finished it up. (R. p. 177.) In the summer of 1921 his brother and Bert Ingram did what summer fallowing was done and the seeding was done by Bert Ingram and in the spring of 1922 what spring wheat was seeded was put in by his brother and another man. (R. pp. 178-179.) In 1922 in the

spring he did do some work but he got sick and had to lay off according to his brother's testimony (R. p. 179) and the result was that from that time on he never again attempted to do any work (R. p. 53). It will be noted from the testimony that the farming operations on the Appellee's farm never paid during any of the time that he was attempting to do any work or have anything to do with the work, (R. pp. 48-58) and that it was only in the year 1923 after he quit attempting to do anything that the ranch showed any appreciable return. (R. p. 57.) At that time it will be remembered he had been to Dr. Larson for treatment in June, 1922 and July, 1922, (R. p. 60) and in January or February of 1923 consulted Dr. Porter of Lewistown (R. p. 61) and was by him sent to the hospital in Helena for treatment (R. p. 24) and was there for at least six weeks (R. p. 54) during all of the time that the spring wheat crop was being planted, he getting out of the hospital in May or June of 1923 (R. p. 54) and at the end of the year was in such physical shape that he was sent to the St. Paul Hospital and remained there for thirteen or fourteen months. (R. p. 54.) Thus we see that the only time when the ranch showed a profit he was in the hospital and in no physical condition to do anything. The testimony is clear that he attempted to do nothing whatever after the year 1922. (R. p. 53.) Certainly it cannot be said simply because a man owned a ranch before he went into the army that it is impossible for him to become totally and permanently disabled if he turns the ranch over to someone else and they pay him as rental a

portion of the crop while he is lying flat on his back. But that is exactly what would have to be decided to hold that the work record of the Appellee negatives the fact that he was totally and permanently disabled.

There is not the slightest iota of evidence offered by the Appellant to contradict any of this testimony and a half dozen or more witnesses were called by the Appellee who corroborated him in every detail in this respect. The only evidence offered by the Government in refutation of any of the Appellee's case was a bank account which in the first place wasn't even shown to be the bank account of Appellee (R. p. 261) and showed only the total deposits made over a period of years by someone in this account. There wasn't any evidence offered whatever to show that if the bank account was that of the Appellee that any of the money was derived from any occupation that he was engaged in. or was the result of any services that he had performed or anything in the world to connect the bank account or the deposits made therein with the Appellee. As pointed out above the Appellee was in such physical condition at the time of the trial he could not take the stand to testify. It is as reasonable to suppose that all of the funds therein deposited were the result of an inheritance or some other source as it is to suppose that they came from the result of labor. As a matter of fact the record shows that he was compelled to dispose of a good deal of the property that he had prior to his enlistment in the army. For instance he had to sell all of his cattle because he didn't feel able to take care of them. (R. p. 58) also some eight or ten head of

horses. (R. p. 59.) The jury undoubtedly gave this evidence just what weight it deserved—absolutely nothing. To say that a man who has $50,000 in the bank can't become totally and permanently disabled is to say something that on the face of it is not true, or to assume that a person who has deposited some $20,000 in the bank in the course of eight or ten years acquired all of that money as a result of personal work is to assume something that isn't true. We know as a matter of fact that during that time a large portion of that money was paid to him as compensation by the Government. As a matter of fact if the Government paid him total and permanent disability from the date of discharge it would have paid him a total of $25,000 by that time and during the period of time covered by this account because he did not put in application for his compensation until after the bank account had been started in 1923 (R. p. 60) and the Government then would have paid his compensation back to the date of discharge. So that if he put nothing else in his bank account other than the compensation paid to him by the Government then he would have accounted for practically all of the money or at least the greater portion of it.

Our Supreme Court has laid down the rule that must be applied. Their language is:

> "Total and permanent disability is to be considered reasonably and having regard to the circumstances of each case; that which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves without serious loss of productive power against injury or disease sufficient

totally to disable others." *Lumbra vs. U. S. 290 U. S. 551 78 L. Ed. 492.*

The reason, justice and good sense behind this language of the Supreme Court is very evident in this case.

"That which sometimes results in total disability may cause slight inconvenience under other conditions"—how applicable here are these words. A man slightly ill is not given treatment—is sent back to "duty"—struggles along and attempts to do so—becomes a prey for other diseases because of his weakened physical condition which probably could have been obviated under other circumstances and under other conditions if he had received treatment—not having received treatment he becomes the victim of mumps which under proper conditions and circumstances would not have been particularly disabling—he receives no treatment—therefore, they were allowed to go down on him which in itself might not be particularly disabling under other circumstances—still he is not given treatment—is compelled to do "duty"—to pack a 73 pound pack on a two mile hike—it completely knocks him out—still receiving no treatment—is sent overseas and encounters gas with very virulent effects because of the circumstances that preceded the gassing, had they not been present, and had they not existed, the gas might not have been particularly disabling but which, because of the conditions and these particular circumstances, became extremely disabling—he goes on and is gassed again—is blown up by a high explosive shell—all of which because of the particular conditions existing and because of the dis-

tinctive "circumstances of this case", brought about the pronounced condition of shell shock described by his buddies and made him turn an old man overnight and left him nerve wracked, the victim of hellish nightmares and dreams sufficient to upset even a well man and left his weakened constitution, impaired by internal abnormalties, his heart overtaxed and strained beyond the point where he could work without endangering his life—his mind and nerves completely wracked—in fact left him the total wreck he was in the eyes of all who saw him.

CONCLUSION

No error was committed by the lower court in the admission of the opinion evidence assigned as error in that the objections now urged were not raised in the court below and are raised for the first time on appeal. The evidence amply sustains the verdict and is uncontradicted. Consequently the decision of the lower court should be affirmed.

Respectfully submitted,

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